Military Commissions, Past and Future

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The detention of suspected terrorists has raised questions about how they will be held accountable for their alleged crimes. President George W. Bush authorized the use of military commissions to try non-U.S. citizens involved in terrorist activities. Lieutenant Colonel Jody Prescott and Major Joanne Eldridge examine the role of military commissions in the U.S. Army's history.

ON 17 JANUARY 1865, Confederate Army Captain Robert Kennedy was convicted by a military commission of spying and other violations of the law of war "in undertaking to carry on irregular and unlawful warfare."[1] Kennedy apparently intended to set New York City on fire and was seen in other parts of the state while in disguise. A military commission sentenced him to hang, and the reviewing authority confirmed the sentence.

Kennedy's case is not merely of historical interest because of the 11 September 2001 terrorist attacks on New York City; it is pertinent in light of President George W. Bush's Military Order of 13 November 2001, which authorizes the use of military commissions to try non-U.S. citizens involved in attacks for certain terrorist activities.[2] Significantly, U.S. Department of Defense (DOD) Military Commission Order (MCO) 1, which Secretary of Defense Donald Rumsfeld issued on 21 March 2002 to implement the Military Order, authorizes line officers to sit as members of military commissions or as members of review panels to review convictions of individuals tried by military commissions.[3]

What is a military commission, and when and why is it used rather than a court-martial? Generally, a military commission is a "court convened by military authority for the trial of persons not usually subject to military law but who are charged with violations of the laws of war, and in places subject to military government or martial law, for the trial of such persons when charged with violations of proclamations, ordinances, and domestic civil and criminal law of the territory concerned."[4]

Since the Mexican-American War, U.S. military and civilian commanders have faced circumstances requiring the administration of justice in cases for which courts-martial, authorized by statute or ordinary civilian courts, were inadequate or unavailable. Over time, the military commission evolved as a tool that commanders could use in such situations.

The case of Major John André, the British spy who conspired with Benedict Arnold during the Revolutionary War, is sometimes cited as an example of a military commission. However, the André case was actually held before a board of officers convened on 29 September 1780 by General George Washington to serve as a board of inquiry, which was not empowered to adjudge a conviction or to determine a sentence. After interrogating André, the board recommended to Washington that André "be considered as a spy from the enemy, and that agreeable to the law and usage of nations, he ought to suffer death."[5]

In 1776, the Continental Congress passed a law making espionage by non-U.S. citizens or nationals a capital offense triable by court-martial. Similarly, the 1776 Articles of War made giving assistance to the enemy and giving intelligence to the enemy capital offenses triable by court-martial. Interestingly, one of André's and Arnold's alleged accomplices, Joshua Hett Smith, was tried by court-martial and acquitted.[6] Washington, however, thought further inquiry into André's case was unnecessary and ordered André to be hanged.[7]

Under the provisions of the 1806 Articles of War, which retained court-martial jurisdiction over spies

and those who assisted or gave intelligence to the enemy, General Andrew Jackson court-martialed civilians accused of hostile acts. In March 1815, while New Orleans was still under martial law, Louis Louillier was tried by a general court-martial for a number of alleged offenses, including spying.[8] The court-martial found it only had jurisdiction over the spying offense, of which Louillier was acquitted.[9] In 1818, Jackson tried two British citizens by general courts-martial in Florida for espionage and for providing assistance to hostile Indians. Both were convicted and executed.[10]

The Mexican-American War to Reconstruction

The first documented use of a proceeding called a military commission by the U.S. Army occurred in Mexico in 1847. The U.S. Army occupied large expanses of Mexican territory that lacked the civilian judicial infrastructure to adjudicate cases not covered by the Articles of War.[11] That year, General Winfield Scott issued General Order (GO) 20, which allowed enumerated offenses committed by Mexicans and other civilians outside the jurisdiction of the 1806 Articles of War to be tried before military commissions. Military commissions were also given jurisdiction to try U.S. Army personnel for offenses not covered by the Articles of War. As many as 29 military commissions were held, some of which tried multiple defendants.[12]

Although sometimes cited as examples of military commissions, the trials of members of the Saint Patrick's Battalion, a unit of primarily ethnic Irish soldiers who fought for the Mexicans, were actually courts-martial for desertion from the U.S. Army.[13] Scott also ordered the creation of "councils of war," similar to military commissions, which tried violations of the law of war. Few cases were tried in this fashion, however, and such councils were not used again.[14]

The difficulties U.S. commanders faced in the Mexican-American War with regard to administering justice in the former Mexican areas for which they were responsible pale in comparison with the challenges confronting Union commanders during the Civil War. As the war progressed, the Union states were under limited martial law. Some Union states, like Kansas, were under greater degrees of martial law at various times. Stricter martial law often applied to border states like Kentucky and Missouri, where populations with Confederate sympathies provided support for Confederate irregulars. As the Union occupied ever more Confederate territory, Union commanders faced hostile populations in the area of operations, and strong, sometimes violent, antiwar sentiment in the rear.[16] From early in the Civil War, the military commission proved useful to Union commanders. By war's end, thousands of cases had been tried.[17]

Although Union forces were used for various law-enforcement purposes during the war, the authority for use of military commissions was unclear. Statutory recognition of military commissions was sparse during the early part of the Civil War, and the commissions were not included in the Articles of War.[19] Union forces, under the command of Major General John Frémont, began using military commissions in Missouri as early as September 1861.[20] Frémont's successor, Major General Henry Halleck, had served as Secretary of State in the military government of California during the Mexican-American War, and he was familiar with the use of military commissions.[21] On 1 January 1862, Halleck issued a general order permitting and detailing the use of such commissions. Although military commissions were not required to use the same procedures as courts-martial, the general order directed that military commissions be "ordered by the same authority, be constituted in a similar manner, and their proceedings be conducted according to the same general rules as courts-martial, in order to prevent abuses which might otherwise arise."[22]

President Lincoln issued a proclamation authorizing the use of military commissions to try "rebels, insurgents, and all persons 'guilty of any disloyal practice affording aid and comfort to rebels.'" Lincoln suspended the writ of habeas corpus for individuals convicted and sentenced by courts-martial or military commissions. Congress modified Lincoln's proclamation [in 1863].

Halleck's order tracks closely with Article 36 of the Uniform Code of Military Justice (UCMJ), which allows the President to prescribe regulations "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts" to cases tried "in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry."[23] Other Union commanders followed Halleck's lead and issued their own general orders permitting the use of military commissions.[24]

In March and June 1862, after military commission convictions from Missouri were forwarded to the War Department for review, U.S. Army Judge Advocate Major John Lee, advised the Secretary of War that there was no legal basis for military commission trials of civilians within the United States.[25] Halleck assumed the post of general-in-

chief of the Army in July 1862, and when Congress created the new position of judge advocate general, Halleck did not recommend Lee for the position.[26] Instead, Colonel John [Joseph?] Holt was appointed judge advocate general. In September 1862, Holt advised the secretary of war that the use of military commissions was not only suited to the exigencies of the times, but that "long and uninterrupted usage made them part and parcel of military common law."[27]

Military commissions were a prominent feature of the U.S. Army's administration of justice in the South during Reconstruction and were specifically authorized by Congress. . . . Although some civilians were still tried for offenses that had occurred during the Civil War, military commissions more often tried civilians for violations of civilian law in areas where civil courts were not functioning or were perceived by commanders as not administering justice impartially.

On 24 September 1862, President Abraham Lincoln issued a proclamation authorizing the use of military commissions to try "rebels, insurgents, and all persons 'guilty of any disloyal practice affording aid and comfort to rebels.'"[28] Lincoln suspended the writ of habeas corpus for individuals convicted and sentenced by courts-martial or military commissions.[29] Congress modified Lincoln's proclamation with the Habeas Corpus Act of 1863. Persons imprisoned under the terms of the act were entitled to be discharged if a civilian grand jury did not indict them or if charges pending against them had not been presented to the grand jury. Military authorities were required to provide civilian courts with lists of such persons.[30]

In October 1864, Union military personnel arrested Lambdin Milligan in Indiana on charges that included conspiracy against the U.S. Government and disloyal practices. Milligan belonged to a group with strong Southern sympathies, and he agitated publicly against the war. A military commission in Indiana convicted and sentenced him to death. Meanwhile, the appropriate grand jury convened, deliberated, and adjourned without returning an indictment against Milligan. The U.S. Supreme Court eventually decided Milligan's appeal for a writ of habeas corpus in 1866. The Court concluded that it had jurisdiction to hear the case and that under the Habeas Corpus Act of 1863, Milligan should have been released. Further, the Court found that the military commission was without jurisdiction to try a civilian citizen of a loyal state (Indiana) when the civilian courts were still functioning, when the state had not been a theater of war, and when the state had never been under military dominion. The dissent in this 5-4 decision believed that conditions of military exigency did in fact exist in Indiana at the time Milligan was tried, but that the military commission was without jurisdiction because it had not been specifically authorized by Congress to try such cases.[31] After his release, Milligan brought a civil suit against the commander who ordered him arrested and the members of the military commission that had tried him. The jury found the military personnel liable for false imprisonment, but awarded Milligan only nominal damages.[32]

After the war, military commissions tried hundreds of cases in different areas of the country.[33] The two best known are the trials of the conspirators to assassinate Lincoln and the trial of Captain Henry Wirz, warden of the Andersonville, Georgia, prisoner of war camp.[34] The U.S. Supreme Court determined that a state of hostilities existed between the U.S. and Confederate states (except Texas) until the presidential proclamation of 2 April 1866 and between the United States and Texas until 20 August 1866.[35] The U.S. Supreme Court eventually upheld military commission convictions that occurred in these states during the respective time periods.[36] Before these decisions, however, at least two U.S. district courts in northern states found that military commission jurisdiction ceased when martial law ended in the respective southern states. Accordingly, these courts ordered the release of prisoners who had been tried and convicted after civil government had been reestablished.[37]

Military commissions were a prominent feature of the U.S. Army's administration of justice in the South during Reconstruction and were specifically authorized by Congress for use at this time.[38] Although some civilians were still tried for offenses that had occurred during the Civil War, military commissions more often tried civilians for violations of civilian law in areas where civil courts were not functioning or were perceived by commanders as not administering justice impartially. As during the Civil War, provost courts were used in various areas to adjudicate petty offenses. While the procedures of the military commissions had become fairly uniform by this time, the procedures before the provost courts often varied from command to command.[39] There were approximately 200 trials before military commissions, many of which involved multiple defendants.[40] For example, between March and September 1867, 216 individuals were tried before military commissions in North and South Carolina.[41] As the southern states gained readmission to the Union and representation in Congress, martial law was terminated within them, and all military com-

missions ceased to operate as of July 1870.[42]

The Indian wars to World War II

U.S. Army commanders occasionally used military commissions during conflicts with Native American tribes on the western frontier. In autumn 1862, a military commission in Minnesota tried 425 members of the Dakota tribe for offenses resulting from a bloody uprising that August.[43] Of that number, 321 were convicted. In taking action on the cases after his review, Lincoln eventually approved the death sentence in 38 of the 303 cases in which it had been adjudged.[44] In 1872, a military commission was used to try Modoc tribesmen for the murder of General Edward Canby and others.[45]

US Army

An officer from the 633d Medical Clearing Station pins 4-inch white aiming marks to the chests of German soldiers captured in U.S. uniforms and convicted of spying, Henri-Chapelle, Belgium, 23 December 1944.

Between October 1944 and May 1945, military commissions tried approximately 67 individuals, and at least 32 were executed. Among these were 18 German soldiers captured while wearing U.S. uniforms behind U.S. lines during the Battle of the Bulge. They were convicted of spying and executed. In the period between the end of the fighting in Europe and General Dwight D. Eisenhower's 25 August 1945 proclamation of a military government in Germany (with a system of military courts), military commissions continued to try individuals.

Military commissions were also employed during the 1898 Spanish-American War. Although military governments using the local court systems of Cuba and Puerto Rico were set up after the U.S. occupation of those islands, military commissions had jurisdiction to try cases until the peace treaty between Spain and the United States was ratified on 1 April 1899.[46] After the treaty became effective, the U.S. military government in Puerto Rico was replaced by a provisional government, which was itself replaced by a civilian government in 1900.[47] The situation in the Philippines might have been different, given the native insurgency, but the Philippines likewise had a civilian government by 1902.[48]

During the labor strife and civilian unrest in the United States in the early 1900s, some governors instituted martial laws, and several states used military commissions to try civilians charged with violations of martial law. In 1912 and 1913, state military commissions in West Virginia tried at least seven individuals for violations of martial law imposed by the state governor.[49] In Nebraska in 1922, several defendants were tried before a state military commission during a period of martial law. They were convicted and sentenced to prison terms. The U.S. District Court for Nebraska, in denying the prisoners' applications for writs of habeas corpus, held that although the state courts had remained open during this time and the National Guard commander could have sent their cases to these courts, he was not required to do so. Accordingly, the court concluded that the sentences lawfully adjudged during the period of martial law remained valid even after martial law was lifted.[50] To the extent that these cases relied on the declaration of martial law as being determinative as to the propriety of holding military commissions, the U.S. Supreme Court has cast doubt as to whether these cases are still good law.[51]

World War II

The vast geographical scope of U.S. military operations during and after World War II presented commanders with numerous and complex challenges regarding the administration of justice. During the war, military commissions were used at home and abroad to try so-called "unlawful combatants." After the war, military commissions tried numerous Axis war criminals and, as the United States assumed the duties of an occupying power, exercised jurisdiction

over even ordinary cases involving local civilians. Significantly, World War II and the immediate postwar era were the last times U.S. Armed Forces conducted military commissions. Such commissions predate the UCMJ and the profound evolution of the present military justice system. Of note is that military commissions did not conduct the famous war crimes trials held after World War II. Instead, international military tribunals conducted the Nuremberg and Tokyo trials.[52]

In the *Quirin* case in 1942, the U.S. Supreme Court upheld the use of military commissions to try persons in the United States for offenses against the law of war and the Articles of War.[53] Quirin was one of eight men transported to the United States by German submarine in 1942. The men landed in New York and Florida wearing German military uniforms, which they buried, and carrying explosives. Their instructions from the German High Command were to destroy American war facilities and industries. The FBI captured all eight, and they were tried before a military commission appointed by President Franklin D. Roosevelt on 2 July 1942. During the proceedings, the defendants appealed to the U.S. Supreme Court, which found that the trial of the men (seven German citizens and one American) by military commission without a jury was legal. The decision was based on the men's status as unlawful combatants, saboteurs, who were not entitled to prisoner of war status.[54] Later in the war, on the basis of this decision, a federal appeals court found the military commission trial of a U.S. citizen in the employ of the Third Reich also to be proper. The citizen had been landed on the coast of Maine by a German submarine in 1944.[55]

Within hours of the attack on Pearl Harbor on 7 December 1941, the civilian territorial governor suspended the writ of habeas corpus and placed the territory under martial law.[56] The commander of the Military Department of Hawaii issued GO 4, which set up a judicial system composed of military commissions and provost courts to try cases. The civil courts reopened in January 1942 to conduct their normal business, but as agents of the military governor and under certain restrictions to their respective jurisdictions. For example, civil courts could not hear criminal cases or empanel grand or petit juries.[57]

In March 1943, by proclamation of the territorial governor, the civilian government resumed nearly all of its prewar functions. However, GO 2 allowed military commissions to retain jurisdiction over cases arising from a "violation by a civilian of the rules, regulations, proclamations, or orders of the military authorities, or of the laws of war."[58] Although the privilege of habeas corpus was restored in 1943, military rule in Hawaii continued for three more years.

The quality of the administration of justice under martial law was sharply criticized by U.S. Government investigations and reports. This was particularly true of the provost court system.[59] When convicted prisoners brought petitions for writs of habeas corpus before the U.S. Supreme Court, the prisoners were released immediately. The Supreme Court was unimpressed with the rationale for the use of the martial law court system rather than the civil courts, holding that civilians in Hawaii were entitled to the constitutional right to fair trial and that martial law was not intended to supersede civilian courts.[60]

Japanese war criminals, including commanders, soldiers, and military judicial officials, who had condemned Allied service members after unfair trials, were tried before Allied military courts in the China and Pacific Theaters. U.S. military commissions tried cases in occupied Japan and in liberated allied areas.[61]

Perhaps the best-known military commission trial in the Far East was that of General Tomoyuki Yamashita, former commander of Japanese forces in the Philippines. The commission was composed of five general officers and was convened by General Douglas MacArthur.[62] Yamashita was charged with unlawful disregard of and failure to discharge his duty as commander to control the members of his command from committing brutal atrocities in the Philippines against civilians and prisoners of war. His trial began on 29 October 1945 and concluded on 7 December 1945. The military commission found him guilty and sentenced him to death by hanging. Because his trial was held under U.S. auspices in the Philippines, a U.S. territory until 1946, Yamashita was able to appeal to the U.S. Supreme Court, arguing that the military commission lacked jurisdiction to try him. The Supreme Court disagreed, finding that the Articles of War granted jurisdiction to both general courts-martial and to military commissions and that the Geneva Conventions of 1929 did not require one form of trial over the other.[63] Yamashita's appeal was denied and he was hanged. International law now requires that prisoners of war receive the same kind of trial using the same rules by which service members of the detaining state are tried.[64]

In 1945, a German national named Eisentrager and 20 other Germans were convicted by a military commission in China on charges that they had provided intelligence information to the Japanese after the Third Reich surrendered. After the prisoners were repatriated to occupied Germany to serve their sentences, they petitioned for a writ of habeas corpus in U.S. District Court, alleging that their trial and imprisonment violated the U.S. Constitution and the Geneva Conventions relative to the treatment of prisoners of war. Their appeal eventually reached the U.S. Supreme Court. The Court held that enemy

prisoners of war, captured and tried outside the United States by military commissions for law of war offenses committed outside the United States and serving their sentences outside the United States, had no right to petition for a writ of habeas corpus in U.S. courts. The Court also rejected the petitioners' claims of procedural irregularities under the Geneva Conventions of 1929, concluding that the military commission that tried them had proper jurisdiction.[65]

The U.S. Army began using military commissions in the European Theater as early as October 1944. Army Group commanders "were authorized to appoint military commissions for the trial of persons not subject to the [Articles of War] who were charged with espionage or with violations of the law of war that threatened or impaired the security or effectiveness of U.S. forces."[66] Military commissions were required to have at least three officers, and defendants had the right to counsel. The commissions were not bound by the evidentiary rules for courts-martial or by the maximum punishments authorized under the Articles of War.[67]

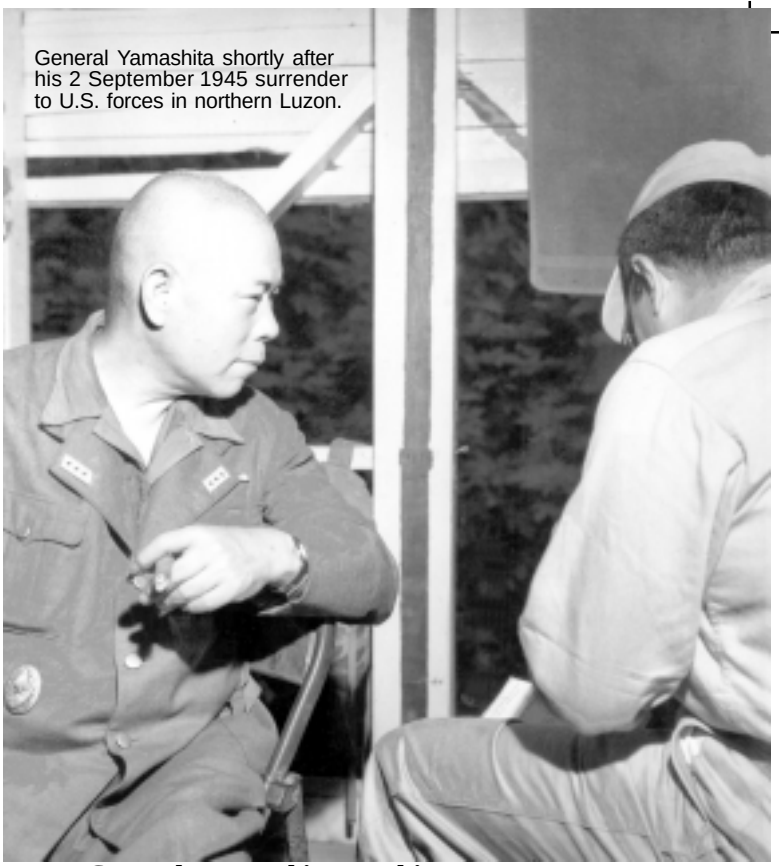
Between October 1944 and May 1945, military commissions tried approximately 67 individuals, and at least 32 were executed.[68] Among these were 18 German soldiers captured while wearing U.S. uniforms behind U.S. lines during the Battle of the Bulge. They were convicted of spying and executed.[69]

In the period between the end of the fighting in Europe and General Dwight D. Eisenhower's 25 August 1945 proclamation of a military government in Germany (with a system of military courts), military commissions continued to try individuals. Even after the proclamation, trials by military commission continued for a short time.[70] The military government in occupied Germany gave way to a civilian occupation government in 1949, and the civilian occupation government ended (except for Berlin) in 1953.[71] In the Mediterranean Theater, as in the China Theater, certain U.S. allies allowed military commissions to try alleged Axis war criminals on their soil for a number of years after the fighting had stopped, even though by then these allies had reconstituted their judicial systems.[72]

Contemporary Litigation

The adjudication of cases dealing with the jurisdiction of a military commission actually began during the Civil War. As an alleged Lincoln Assassination conspirator, Dr. Samuel Mudd was tried in Washington, D.C., by a military commission. Mudd was a citizen of Maryland, a border state, and had not been in the military. At the time of his trial, the civil courts in Washington and Maryland were open.[73] Mudd was convicted and sentenced to a term of imprisonment. In 1866, after the *Milligan* decision, Mudd petitioned for a writ of habeas corpus in U.S. District Court. Finding *Milligan* inapplicable, the court denied the petition. The court held that Lincoln was "assassinated not from private animosity nor any other reason than a desire to impair the effectiveness of military operations and enable the rebellion to establish itself into a government. It was not Mr. Lincoln that was assassinated, but the commander-in-chief of the Army for military reasons."[74] Mudd was subsequently pardoned for his humanitarian efforts in prison during a yellow fever epidemic.[75]

Seeking to clear his grandfather's name, Mudd's grandson brought suit against the U.S. Government in U.S. District Court. On 14 March 2001, the court found for the U.S. Government, first noting that the list of types of unlawful combatants set out in *Quirin* that could be tried before military commissions (saboteurs, secret messengers, spies, belligerents not in uniform) was not exhaustive. Further, the court



General Yamashita shortly after his 2 September 1945 surrender to U.S. forces in northern Luzon.

US Army

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found that nationality and whether one was working under the direction of enemy forces was not to be determinative. Instead, the court found "[r]eading *Milligan* and *Quirin* together . . . , that if Dr. Samuel Mudd was charged with a law of war violation, it was permissible for him to be tried before a military commission even though he was a U.S. and Maryland citizen and the civilian courts were open at the time of his trial."[76] The court found that the charges did allege such a violation, and the commission therefore had jurisdiction. The government's decision to not disturb Mudd's trial verdict was therefore upheld.[77] On 8 November 2002, the U.S. Court of Appeals for the D.C. Circuit rejected the Mudd family's appeal, finding that Mudd, as a civilian, had no standing under the law which allows military members to seek expungement of military convictions.[78]

In a more recent case, a group calling itself the "Coalition of Clergy, Lawyers and Professors" brought suit in U.S. District Court seeking a writ of habeas corpus for detainees being held at Guantanamo Naval Air Station in Cuba. U.S. forces in Afghanistan had captured the detainees. On 21 February 2002, the court dismissed the petition, finding that the petitioners lacked legal standing, the court did not have jurisdiction to hear the petitioners' claims, and that no federal court would have jurisdiction over their claims. The court relied primarily on the holding of the U.S. Supreme Court in *Eisentrager*, noting that the petitioners had mistakenly characterized the naval base at Guantanamo Bay as part of the United States. The legal status of Guantanamo Bay is governed by a 1903 lease agreement between Cuba and the United States that gives the United States complete jurisdiction and control over the specified areas, but Cuba retains ultimate sovereignty over the leased lands and waters. Therefore, the court concluded that sovereignty over Guantanamo Bay remained with Cuba and not the United States.[79]

On 1 August 2002, a federal district court in Washington, D.C., rejected a lawsuit brought on behalf of Kuwaiti, British, and Australian detainees at Guantanamo. The detainees sought to compel the government to hold hearings on their cases or transfer them to the custody of their respective countries. The district court ruled that the detainees were outside the United States, and therefore without any constitutional rights of access to the U.S. judicial system.[80] The U.S. Court of Appeals for the District of Columbia affirmed the district court's decision on 11 March 2003.[81] Interestingly, on 8 November 2002, in a suit brought by the mother of a Guantanamo detainee, a British court held that keeping detainees in an area under "exclusive" U.S. control without recourse to a court to challenge their detention appeared to violate both British and international law. The three-judge panel concluded, however, that it had no jurisdiction over the case.[82]

The Uniform Code of Military Justice

In 1950, the UCMJ replaced the old Articles of War and Articles for the Government of the Navy.[83] The UCMJ incorporated substantial reforms that gave those subject to the UCMJ greater rights and standardized the practice of courts-martial across the Armed Forces. In giving effect to the statutory provisions of the UCMJ, the preamble to the *Manual for Courts-Martial (MCM)* provides that the sources of military jurisdiction are the Constitution and international law, including the law of war.[84] Further, the preamble recognizes four means by which commanders apply military jurisdiction: courts-martial for trial of offenses against military law as well as general courts-martial for the trial of persons subject to trial by military tribunal under the laws of war; military commissions and provost courts for the trial of cases within those respective jurisdictions; courts of inquiry; and nonjudicial punishment.[85]

The UCMJ contains two articles (18 and 21) that specifically address the jurisdiction of military tribunals and commissions.[86] Article 18 provides that the jurisdiction of general courts-martial includes the authority to try persons for law of war violations by military tribunal and impose any punishment permitted by the law of war.[87] Article 21 provides that the provisions of the UCMJ "conferring jurisdiction do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction."[88] The UCMJ also contains three other references to the law of war: Article 104 (aiding the enemy), Article 106 (spies), and Article 106a (espionage). These provisions prohibit conduct by "any person," a broader definition than other code provisions, which prohibit conduct by "any person subject to the Code" and permit trials by general court-martial or military commission.[89]

With regard to the procedure to be used by military commissions, the MCM provides that "[s]ubject to any applicable rule of international law or to any regulations prescribed by the President or other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts martial."[90] In his Military Order, Bush specifically found "that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the [U.S.] district courts."[91]

In addition to extensive roles for judge advocates as presiding officers, prosecutors, and defense counsel, DOD MCO 1 provides the potential for significant roles for all military officers.[92] Each commis-

sion shall be composed of at least three but not more than seven members, as well as one or two alternate members, appointed by the secretary of defense or his designee (the appointing authority). Members and alternates will be commissioned officers from all the armed services, including Reserve officers on active duty, National Guard officers on active duty, and even retired officers recalled to active duty. Although DOD MCO 1 provides no rank or grade requirements, the appointing authority appoints members "determined to be competent to perform the duties involved."[93] The length of such appointment is not specified.

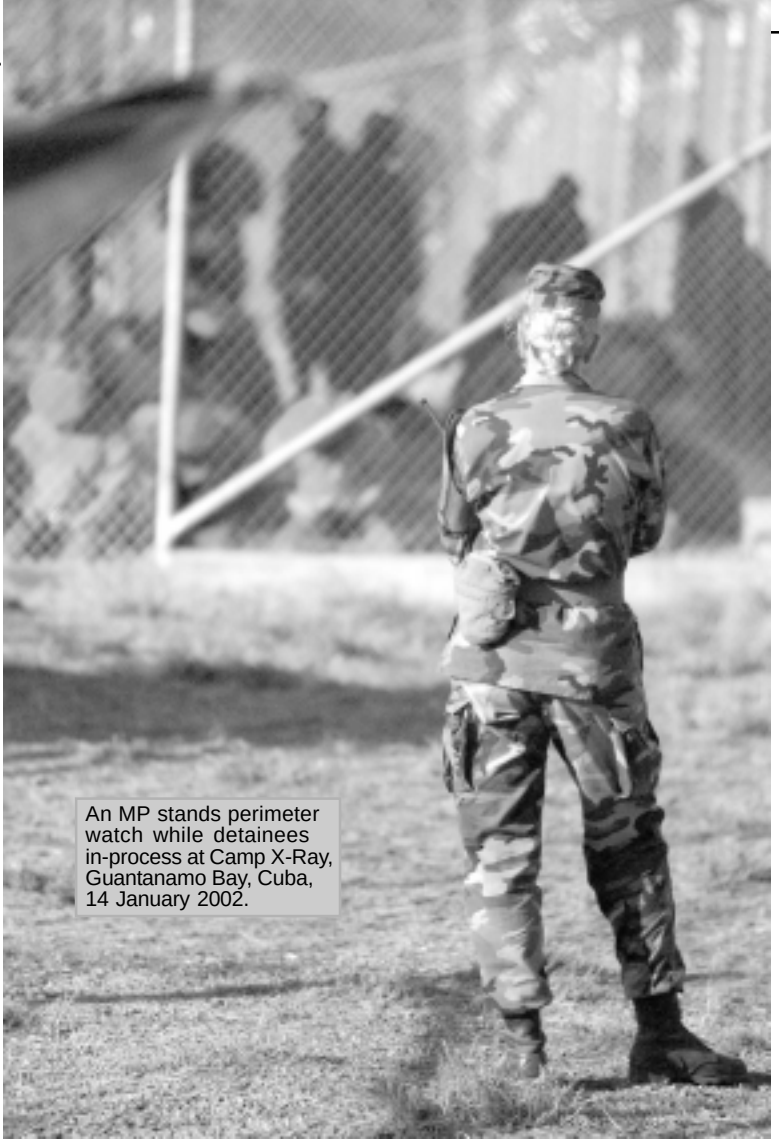
DOD MCO 1 provides detailed procedures applicable for each accused tried before a military commission. Each accused will be represented by a military defense counsel detailed to his case at no expense to him. The accused may request a particular military defense counsel (subject to reasonable availability) and may be represented by a civilian attorney at no expense to the United States (subject to certain requirements).[94] The accused may not discharge his military counsel.[95] Other rights may be summarized as follows:

- Right to a copy of the charges in a language the accused understands, as well as the substance of the charges, the proceedings, and documentary evidence.
- Presumption of innocence until proven guilty, and guilt must be proven beyond a reasonable doubt.
- Detailed defense counsel must be made available in advance of trial to prepare a defense.
- Access to evidence the prosecution intends to use as well as access to exculpatory evidence known to the prosecution.
- Right to remain silent at trial, with no adverse inference from the accused's decision not to testify; or to testify, subject to cross-examination.
- Witnesses and documents for the accused's defense, including investigative or other resources required for a full and fair trial.
- Right to present evidence at trial and cross-examine prosecution witnesses.
- Right to be present at proceedings, unless the accused engages in disruptive conduct, except for those portions closed to protect classified information and other national security interests.
- Access to sentencing evidence.
- Right to make a statement and submit evidence during sentencing proceedings.
- Trial open to the public unless closed by the presiding officer.
- Right not to be tried again by any commission on the same charge.[95]

The accused shall also have the right to submit a plea agreement to the appointing authority.[96] Unlike in a court-martial, however, the accused's pleading guilty before a military commission gets him precisely that for which he bargained with the appointing authority rather than the lesser of either the sentence limitation in his pre-trial agreement or the sentence adjudged at court-martial.[97] The standard for admissibility of evidence is that evidence, which in the opinion of the presiding officer would have probative value to a reasonable person.[98]

Before voting for a finding of guilty, commission members must be convinced beyond a reasonable doubt that an accused is guilty of the offense based on the evidence admitted at trial. A finding of guilty requires a two-thirds majority of commission members. A sentence also requires a two-thirds majority

US Navy



An MP stands perimeter watch while detainees in-process at Camp X-Ray, Guantanamo Bay, Cuba, 14 January 2002.

A federal district court in Washington, D.C., rejected a lawsuit brought on behalf of . . . detainees at Guantanamo. The detainees sought to compel the government to hold hearings on their cases or transfer them to the custody of their respective countries. The district court ruled that the detainees were outside the United States, and therefore without any constitutional rights of access to the U.S. judicial system.

of members, except for a sentence of death, which must be unanimous. A sentence may include death; confinement for life or for a lesser period; payment of restitution or a fine; or such other lawful punishment as the commission deems appropriate. To adjudge a sentence of death, the commission must be composed of seven members.[99] Military officers have an important role to play in the post-trial phase of military commissions. The secretary of defense shall designate a review panel consisting of three military officers, which may include civilians commissioned in compliance with USC requirements.[100] The review panel must include at least one member who has experience as a judge. The panel is charged with reviewing the record of the commission proceedings and written submissions by the prosecution and defense. The panel must either forward the case to the secretary of defense with a recommended disposition or return the case to the appointing authority for additional proceedings where there has been a material error of law. The secretary of defense then reviews the case and forwards it to the president for review and final decision. The president can delegate the final decision to the secretary of defense if the president so desires.[101] The order sets forth no other avenues of judicial review or appellate relief, but this does not mean that the U.S. Supreme Court cannot review the case.[102]

Military commissions have been used extensively in the course of American history during periods of martial law, occupation, and war. Unfortunately, this flexibility and usefulness has led to some confusion as to the rules and procedures that should be applied at military commissions held under military order and their propriety under current domestic and international law. Some have criticized the use of military commissions as undermining the rule of law domestically and as not being viewed as credible by the international community.[103] Others criticize the use of a less stringent standard for the admissibility of evidence before the military commission as compared to ordinary U.S. criminal courts and the use of an appeal process that stays within the Department of Defense.[104] Significantly, many critics do not seem to distinguish clearly between the different kinds of military commissions and the various legal regimes that would apply to each respectively. A military commission sitting in the United States and trying U.S. citizens and residents under martial law, such as in *Milligan*, would be quite different from an occupation military commission, such as existed in post-war Germany or Japan. Both would be different from a law of war military commission sitting overseas and trying unlawful combatants, as in *Eisentrager*.

The president's authority to create a law of war military commission is clear under national and international law.[105] As specified in DOD MCO 1, the composition and procedures of the military commissions and review panels substantively comply with internationally accepted standards of due process.[106] Further, trials before military commissions may actually foster the rule of law and the administration of substantive justice. Military commissions will be allowed to consider probative evidence that ordinary U.S. criminal courts cannot, sensitive intelligence sources can be protected, and the issues of trial security are much less pronounced.[107]

On 28 February 2003, the Department of Defense General Counsel's Office released for public comment a draft of the Military Commission Instruction (Draft MCI) that set out the crimes and the elements of those crimes for which certain individuals could be tried before a military commission.[108] The crimes enumerated in the Draft MCI are "violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission."[109] The Draft MCI includes such crimes as the "Willful Killing of Protected Persons,"[110] "Employing Poison or Analogous Weapons,"[111] "Rape,"[112] and "Terrorism."[113] The Draft MCI does not include crimes against humanity or genocide as triable offenses and it does not specifically set out defenses to the enumerated offenses, but it does note that "[d]efenses potentially available to an accused under the law of armed conflict, such as self-defense, mistake of fact, and duress, may be applicable in certain trials by military commission."[114]

It is crucial that officers detailed to these bodies perform their judicial functions with the utmost care and understanding of their positions. These trials must satisfy domestic and international public opinion that justice be served. Further, these trials could constitute precedent for what the United States believes is the minimum due process required in trials of unlawful combatants for violations against the law of war and international law. Other nations or nonstate actors might then hold trials of captured U.S. soldiers or other U.S. Government employees using similar tribunals and procedures. ***MR***

NOTES

1. William Winthrop, *Military Law and Precedents,* 2d ed (Washington, DC: U.S. Government Printing Office [GPO], 1920), 767-70, 784; Ex parte *Quirin et al,* 317 U.S. 1, 31 (1942).
2. Military Order of 13 November 2001, "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism," sec. 1(e), 66 F.R. 57833 (16 November 2001).
3. U.S. Department of Defense (DOD) Military Commission Order (MCO) 1, par. 4.A.(3) (21 March 2002).
4. Edward M. Byrne, *Military Law* (Annapolis, MD: Naval Institute Press, 1981), 752.
5. Winthrop, 518.
6. Ibid, 765; app. X, American Articles of War of 1776, 18 and 19, 967; Ibid., 102 note 21.
7. In a letter informing Major John André's commander of his decision to execute André, Washington noted that he could have summarily executed André rather than even convene a board of inquiry to look into his case (Robert Hatch, *Major John André: A Gallant in Spy's Clothing* [Boston: Houghton Mifflin Co., 1986], 262).
8. Winthrop, app. XII, American Articles of War of 1806, 56 and 57, 981; Ibid., 101, sec. 2, 985. Articles 104 (aiding the enemy), 106 (spies), and 106a (espionage) of the Uniform Code of Military Justice (UCMJ), enacted in 1950, track these early Articles of War provisions closely [10 USC, secs. 904, 906, 906a (2002); Winthrop, 822.
9. John Spencer Bassett, *The Life of Andrew Jackson* (New York: Macmillan, 1928), 226-27.
10. Robert V. Rimini, *Andrew Jackson and His Indian Wars* (New York: Viking, 2001),

154-56; Winthrop, 102, 832.
11. K. Jack Bauer, *The Mexican War* (New York: Macmillan, 1974), 253, 326-27.
12. Winthrop, 832, quoting General Order (GO) 20, 19 February 1847, Headquarters of the Army, Tampico; Ibid., 832 note 66; Bauer, 253, 326-27.
13. Robert P. Miller, *Shamrock and Sword: The Saint Patrick's Battalion in the U.S.-Mexican War* (Norman, OK: University of Oklahoma Press, 1989), 92-112.
14. Winthrop, 832-33.
15. Ibid., 829, 826, 824-27; Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (New York: Oxford University Press, 1991), 46-47, 168.
16. Neely, 65, 69, 174.
17. Winthrop, 834; Neely, 168.
18. Neely, 21, 30, 32-35.
19. "The President shall appoint a Judge Advocate General to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions" (Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," 43 *Stanford Law Review* (1990): 66, quoting Act of 17 July 1862, chap. 36, sec. 5, 12 stat. 597, 598).
20. Neely, 41-42.
21. *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975* (Washington, DC: GPO, 1975), 46.
22. Chomsky, 56, note 269, quoting GO 1, Headquarters, Department of the Missouri, 1 January 1862.
23. 10 USC, sec. 936 (2002).
24. Winthrop, 833.
25. Chomsky, 66, notes 336-37, quoting two letters from Judge Advocate John F. Lee to Secretary of War E.M. Stanton.
26. *The Army Lawyer,* 47.
27. Chomsky, 66, note 338, quoting letter from Judge Advocate General John [Joseph?] Holt to Secretary of War Stanton.
28. Neely, quoting Lincoln's Proclamation of 24 September 1862, citation omitted. Apparently anticipating Lincoln's proclamation, Stanton issued an order on 8 August 1862 that such persons were liable to trial by military commission.
29. Winthrop, 829.
30. Ex parte *Milligan*, 71 US (4 Wall) 2, 107-08 (1866).
31. Ibid., 118-31, 141.
32. *Milligan v. Hovey,* 17 F. Cas. 380, 380-83 (D.C. Ind., 1871).
33. Neely, 176.
34. Winthrop, 839, note 5.
35. Carver's Cases, 16 Ct. Cl. 361, 383 (U.S. Ct. Cl., 1880), citation omitted.
36. *Carver v. U.S.,* 111 U.S. 609 (1884).
37. *U.S. v. Commandant of Fort Delaware,* 25 F. Cas. 590, 591 (D.C. Del., 1866); In re Egan, 8 F. Cas. 367, 368 (Cir. C. N. D. NY, 1866).
38. Winthrop, 848.
39. James E. Sefton, *The United States Army and Reconstruction* (Baton Rouge, LA: Louisiana State University Press, 1967), 30-32.
40. Winthrop, 853.
41. Sefton, 146.
42. Winthrop, 851.
43. *Medawakanton and Wahpakoota Bands of Sioux Indians v. U.S.,* 57 Ct. Cl. 357, 364 (U.S. Ct. Cl., 1922).
44. Chomsky, 33, 88.
45. Robert M. Utley, *Frontier Regulars: The United States Army and the Indian, 1866-1890* (Lincoln, NE: University of Nebraska Press, 1984), 206-07.
46. *Ochoa v. Hernandez y Morales,* 230 U.S. 139, 145-47 (1913); *Santiago v. Nogueras*, 214 U.S. 260, 263 (1909); ex parte *Ortiz,* 100 F. 955, 963 (D.C. Minn., 1900). The petitioner was tried for the murder of a U.S. soldier by a military commission two weeks before exchange of ratifications.
47. *Ochoa,* 230 U.S. at 147.
48. *Kepner v. U.S.,* 195 U.S. 100 (1904).
49. Ex parte *Jones,* 71 W.Va., 567 (Sup. Ct. Appeals, 1913); State ex rel. Mays, 71 W.Va. 519 (Sup. Ct. Appeals, 1912).
50. U.S. ex rel., *Seymour v. Fischer,* 280 F. 208, 209-12 (D.C. Neb., 1941).
51. *Duncan v. Kahanamoku,* 327 U.S. 304, 322, note 18 (1946).
52. *Flick v. Johnson,* 174 F.2d 983, 986 (D.C. Cir., 1949); Viscount Maughm, *U.N.O. and War Crimes* (London: John Murray, 1951), 87-101.
53. *Quirin,* 317 U.S. 1.
54. Ibid., 23-24, 42.
55. *Colepaugh v. Looney,* 235 F.2d 429 (10th Cir., 1956), citations omitted.
56. William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Knopf, 1998), 212.
57. Ex parte *Duncan,* 146 F.2d 576 (9th Cir., 1944), 579.
58. Ibid., 581-82.
59. Harry N. Scheiber and Jane L. Scheiber, "Bayonets in Paradise: A Half-Century Retrospect on Martial Law in Hawai'i, 1941-1946," 19 *Hawaii Law Review* (Fall 1997): 477, 509-18. Initially, the military commission that was set up to hear serious criminal offenses was composed of military and civilian members, but the civilians were eventually dropped.
60. *Duncan v. Kahanamoku*, 327 U.S. 304, 320-24 (1946).
61. Evan J. Wallach, "The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?" 37 *Columbia Journal of Transnational Law* (1999): 851, 884 note 5; Matthew Lippman, "Prosecutions of Nazi War Criminals before Post-World War II Domestic Tribunals," 8 *Yearbook of International Law* (1999-2000): 14, 84, 85.
62. Colonel Frederick Bernays Wiener, "Comment: The Years of MacArthur, vol. III: MacArthur Unjustifiably Accused of Meting Out 'Victors' Justice' in War Crimes Cases," 113 *Military Law Review* (1986): 203, 204.
63. *Law Reports of Trials of War Criminals*, vol. IV, cas. 21 (London: H.M. Stationery Office, 1948), 1-78.
64. Geneva Convention Relative to the Treatment of Prisoners of War, arts. 82-88 (1949).
65. *Johnson v. Eisentrager,* 339 U.S. 763, 765-67, 777, 785, 789-90 (1950).
66. Colonel Ted B. Borek, "Legal Services During War," 120 *Military Law Review* 19 (Spring 1980): 29-30.
67. Ibid., 30.
68. Ibid., 31.
69. MAJ David A. Anderson, "Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty," 127 *Military Law Review* (Winter 1990): 3.
70. *Trials of War Criminals*, vol. III (1948), Cas. 14, 56; Cas. 15, 60; Cas. 16, 62; vol. III, Cas. 17 and 18, 65.
71. *U.S. v. Tiede,* 86 F.R.D. 227, 228-38, U.S. Ct., Berlin, 1979. In 1952, U.S. occupation courts averaged 1,000 trials a month of German and U.S. defendants (*Madsen v. Kinsella*, 343 U.S. [1952], 341, 360 note 23).
72. *Trials of War Criminals*, vol. I, Cas. 2, 22 (1947); vol. XI, Cas. 63, 10 (1949).
73. *Mudd v. Caldera,* 134 F. Supp. 2d 138, 140-42 (D.C. D.C., 2001).
74. *Mudd v. Caldera,* 26 F. Supp. 2d 113, 117 (D.C. D.C., 1998).
75. Ibid., 117.
76. *Mudd,* 134 F. Supp. 2d at 146.
77. Ibid., 147.
78. Neil A. Lewis, "Suit to Clear Doctor Who Treated Booth is Dismissed," *New York Times,* 8 November 2002, 15.
79. *Coalition of Clergy et al. v. George Walker Bush et al.,* 189 F. Supp. 2d 1036, 1039, 1048-50 (C.D. Cal., 2002).
80. Neely Tucker, "Judge Denies Detainees in Cuba Access to U.S. Courts," *Washington Post*, 1 August 2002, A10.
81. Tucker, "Detainees Are Denied Access to U.S. Courts," *Washington Post*, 12 March 2003, A1 "Representatives for the detainees plan to appeal to the U.S. Supreme Court."
82. "Government doesn't care about Hicks: father," *The West Australian*, on-line at <www.thewest.com.au/20030312/news/latest/ tw-news-latest-home-sto91058.html>, 13 March 2003.
83. Enacted by Congress in 1950, the UCMJ is located at Title 10 USC, secs. 801-947 (2002).
84. Manual for Courts-Martial (MCM), 2002 ed., Part I, "Preamble."
85. Ibid.
86. The UCMJ contains several articles that address military commissions (10 USC, secs. 836, 837, 847, 848, 850 [2002].
87. 10 USC, sec. 818 (2002).
88. Ibid., sec. 821 (2002).
89. Ibid., sec. 904, 906 (2002).
90. MCM, "Preamble," par. 2(b)(2), I-1. In his 1912 appearance before the House Committee on Military Affairs, the judge advocate general stated that it "is highly desirable that this important court should be continued to be governed, as heretofore, by the laws of war rather than statute" (*Trials of War Criminals*, vol. IV, 68 note 2, citation omitted).
91. Military Order, sec. 1(f).
92. The presiding officer is tasked with ensuring the proper conduct of the proceedings, ruling on questions of evidence, and sitting as a voting member of the military commission (DOD MCO 1, pars. 4.A(4), (5), and 6.F.
93. DOD MCO 1, par. 4.A.(2), (3).
94. Ibid., par. 4.C.(2), (3), (4).
95. Ibid., par. 5.
96. Ibid., par. 6.A.(4).
97. Rules for Courts-Martial 705(b)(2)(E) and 1107(d)(1), MCM, 2002 ed.
98. DOD MCO 1, par. 6.D.(1).
99. Ibid., par. 6.F; 6.G.
100. Ibid., par. 6.H.(4); 10, USC, sec. 603, 27.
101. Ibid., par. 6.H.(5), (6).
102. President Franklin D. Roosevelt's proclamation that convened the military commission that tried the German saboteurs in the *Quirin* case likewise denied defendants access to the courts, but the U.S. Supreme Court noted that it was still for a court to decide whether the proclamation were applicable to a particular case (*Quirin,* 317 U.S. at 23, 25).
103. Harold Hongju Koh, "The Case Against Military Commissions," *The American Journal of International Law* (April 2002): 338.
104. Sean D. Murphy, "U.S. Department of Defense Rules on Military Commissions," *The American Journal of International Law* (July 2002): 733-34.
105. Madsen, 343 U.S. at 348, 354; MG Michael J. Nardotti, Jr., "Military Commissions," *The Army Lawyer* (March 2002): 1, 4.
106. The International Convention on Civil and Political Rights, art. 14, sets out the minimum due process requirements for trials (G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 21, 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171).
107. Ruth Wedgwood, "Al Qaeda, terrorism, and military commissions," *The American Journal of International Law* (April 2002): 331-32.
108. "DOD Releases Draft Military Commission Instruction," *DefenseLINK*, on-line at <www.defenselink.mil/news/Feb2003/b02282003_bt092-03.html>, 28 February 2003.
109. Draft MCI, par. 3.A, on-line at <www.defenselink.mil/news/Feb2003/d20030228dmci.pdf.>
110. Draft MCI, par. 6.A.1.
111. Draft MCI, par. 6.A.8.
112. Draft MCI, par. 6.A.16.
113. Draft MCI, par. 6.A.18.
114. Draft MCI, par. 4.B. "With respect to the defense of lack of mental responsibility, the accused has the burden of proving by clear and convincing evidence, that, as a result of a severe mental disease or defect, the accused was unable to appreciate the nature and quality of the wrongfulness of the accused's acts."

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